IN THE

Supreme Court of the United States

No. ———, ORIGINAL.

STATE OF LOUISIANA, *Plaintiff*,

versus

CLAUDE CUMMINS, ET AL., *Defendants.*

OPPOSITION TO GRANTING OF LEAVE TO FILE COMPLAINT

and

BRIEF IN SUPPORT THEREOF.

BON GEASLIN,
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OPPOSITION TO GRANTING OF LEAVE TO FILE COMPLAINT

Comes now Abraham L. Shushan, sought to be made one of the defendants in the above entitled cause, and, in response to the rule to show cause issued herein on June 9, 1941, opposes the motion of the State of Louisiana for leave to file its original complaint in this Court herein, on the following grounds, supported in the accompanying brief:

1—This Court is without jurisdiction of this cause,

a—Because the State of Louisiana is neither a real nor the proper party complainant therein;

b—Because the action involves, in any event, claims against this opponent, a citizen of Louisiana, as a necessary and indispensable party thereto.

2—This Court should decline to take jurisdiction of this cause, because it is not a suit in equity, but is a simple action at law for an ordinary money demand, required to be tried by jury.

WHEREFORE, with full reservation of any and all pleas and defenses to the proposed complaint, appearer prays that this Court deny leave to the State of Louisiana to file its original complaint in this Court herein.

BON GEASLIN,
Washington, D. C.,
Attorney for Appearer.

Washington, D. C.,
September 29, 1941.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ———, ORIGINAL.

STATE OF LOUISIANA, *Plaintiff*,

versus

CLAUDE CUMMINS, ET AL., *Defendants*.

BRIEF IN SUPPORT OF OPPOSITION.

The opposition of the proposed defendant to the application for leave to file the complaint, is based on both a want of constitutional jurisdiction of this Court to entertain such a cause, and on an alternative plea to decline to entertain the cause even though technical jurisdiction may exist.

1—This Court is Without Jurisdiction of this Cause,

a—Because the State of Louisiana is neither a real nor the proper party complainant therein.

The proposed complaint involves an action for damages representing sums of which the proposed defendants are alleged to have defrauded the Board of Levee Commissioners of the Orleans Levee District (to which reference is herein made simply as the Levee Board). It is the position of this proposed defendant that the State of Louisiana, as such, has no interest in the matter, and is neither a real nor a proper party complainant in such an action.

The Levee Board was created by Act of the Legislature of Louisiana,[1] which gave the Board all needful corporate powers, including the right to sue and be sued in its corporate name.[2] These powers were given subsequent constitutional sanction and perpetuity,[3] thus placing them beyond the authority of the legislature to alter or repeal.

The direct point as to the right of the State of Louisiana to sue on causes of action vesting in the Levee Boards of the State, was decided adversely to that contention by the Supreme Court of Louisiana in 1910.[4] The case involved an action to set aside a sale of land by one of the Levee Boards, and to obtain restitution, on the ground that the sale was a fraudulent one through collusion of members of the Board with the purchasers. The Court held that although the Levee Boards of Louisiana are agencies of the State, "no one would venture to say that the Attorney General could ignore the existence of these corporations and enforce, in the name of the State, any cause of action which any of them might have."[5]

The statute under which the proposed complaint is sought to be filed,[6] provides for a recovery "in the name of the State of Louisiana" of "any claim of the State for any" money or property fraudulently diverted "from the State".[7] In the case last cited,[8] the Supreme Court of Louisi-

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[1] Louisiana Act 93 of 1890.

[2] *Ibid.*, Section 3.

[3] "The Board of Levee Commissioners of the Orleans Levee District shall have and exercise all and singular the powers now conferred upon said Board by law, as well as such powers as are herein granted." Art. 16, sec. 7(a), La. Const. of 1921, as amended by Act 4 of the Ex. Sess. of 1930, adopted November 4, 1930.

[4] *State* v. *Tensas Delta Land Co.*, 126 La. 59 (1910).

[5] *Ibid.*, at p. 71.

[6] Louisiana Act 13 of 1940.

[7] Sec. 3(b). The statute also provides that the word "State" as therein used, includes "all public boards and commissions, all public corporations or authorities," etc., etc. Sec. 2.

[8] *State* v. *Tensas Delta Land Co., supra,* Note 4.

ana held that such a recovery by the State, of assets given by statute to the Levee Board, would "frustrate and nullify an admittedly valid statute." In the instant case, the assets involved have been placed in the hands of the Levee Board by constitutional provision,[9] so that the legislature could not in any event deprive the Board thereof; thus giving added force to the right of the Levee Board alone—to the exclusion of any such right in the State as such—to seek judicial recovery of the assets.

Following the decision of the Supreme Court of Louisiana in the case of *State* v. *Tensas Delta Land Company, supra,* denying the right of the State to sue on a claim of one of its Levee Boards, the Louisiana legislature enacted a statute[10] authorizing the Attorney General, for and in behalf of the State, to enter proceedings involving real property "belonging to the State of Louisiana or any of its political agencies or subdivisions, whether the title to said land or real property is vested in or appears in the name of the State, or in the name of any of its political agencies or subdivisions".

After the enactment of this statute, an attempt was again made by the Attorney General of Louisiana to control, in behalf of the State as such, subsequent litigation involving the same land of the Levee Board, and the same transaction, in which the suit of the State against the Tensas Delta Land Company had theretofore been dismissed. The case reached this Court in due course, and it was held[11] that the Supreme Court of Louisiana, in the case of Tensas Delta Land Company, had settled the law to the effect that "the State was without title or beneficial interest which would enable it to maintain a suit to set aside the sale alleged to be fraudu-

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[9] Art. 16, sec. 7(e) pg. 2, La. Const. of 1921, as amended by Act 4 of the Ex. Sess. of 1930, adopted November 4, 1930.

[10] Louisiana Act 3 of the Extra Session of 1910.

[11] *United States ex rel. Louisiana* v. *Boarman,* 244 U. S. 397 (1917).

lent"; that the Levee Board remained the only proper plaintiff in such an action; and that the purpose of the statute was simply to authorize the Attorney General, under certain circumstances, to act for and on behalf, and in conjunction with, the Levee Board in such a suit.[12]

The same point was again adjudicated by the Supreme Court of Louisiana in 1927, in a case involving an action by the State, in behalf of another of the Levee Boards, against certain oil companies for the value of oil produced from land owned by the Levee Board. The Court held,[13] that while the Levee Board is a state agency, "it alone must assert its right of action"; and that even under the statute of 1910 quoted above, "the Attorney General has no right to sue for and in the name of the State on a cause or right of action possessed only by the Levee Board"; and the Court expressly approved the decision of this Court in the case of *United States ex rel. Louisiana* v. *Boarman, supra.*[14]

Similarly, the Supreme Court of Louisiana has held that a provision of the Constitution of Louisiana to the effect that "prescription shall not run against the State",[15] nevertheless "applies to any or all other public corporations or agencies", the exemption being "confined to actions brought by and in the name of the State itself".[16]

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[12] See also: *Board of Comm'rs. of Tensas Basin Levee Dist.* v. *Hardtner*, 164 La. 632 (1927).

[13] *State* v. *Standard Oil Co.*, 164 La. 334, 357 (1927).

[14] *Ibid.*, at p. 368. As late as 1930, the Supreme Court of Louisiana reiterated its approval of the foregoing doctrine, in a case involving the same Levee Board as is involved in the proposed complaint in the instant proceeding. *Board of Levee Comm'rs.* v. *Whitney Trust & Savgs. Bk.*, 171 La. 28, 35 (1930).

[15] Constitution of Louisiana, Art. 19, sec. 16.

[16] *Board of Comm'rs* v. *Toyo Kisen Kaisha*, 163 La. 865, 867 (1927). This language was quoted with express approval as to a Louisiana Levee Board, on the ground that "it is a separate entity from the State, created by the State, it is true, to accomplish certain public purposes, but is nevertheless distinct from it." *Board of Comm'rs. of Caddo Levee Dist.* v. *Pure Oil Co.*, 167 La. 801, 812 (1929). See also: *Board of Comm'rs. of Tensas Basin Levee Dist* v. *Earle*, 169 La. 565 (1929); *Board of Levee Comm'rs. of Orleans Levee Dist.* v. *Whitney Tr. & Savgs. Bk.*, 171 La. 28, 35 (1930).

The Supreme Court of Louisiana has held time and again, in situations far stronger than that involved in the proposed complaint, that the State of Louisiana is not a proper party to a proceeding in which one of its agencies is the real and only party at interest. Thus, that Court has held[17] that even though contracts for highway improvements in Louisiana must, under the law, be made in the name of the State, suits on such contracts must "be instituted by the (Louisiana Highway) Commission and not by the State."[18]

The foregoing decision was quoted with approval by the United States Circuit Court of Appeals for the Fifth Circuit, in *Louisiana Highway Commission* v. *Farnsworth*,[19] holding that the federal courts have jurisdiction over suits against the Louisiana Highway Commission, on contracts made in the name of the State of Louisiana, such suits not being against the State.

It is accordingly respectfully submitted that the real party at interest in the controversy exhibited in the proposed complaint in the instant proceeding, is not the State of Louisiana, but is the Board of Levee Commissioners of the Orleans Levee District; and the State, not being the real or a proper party complainant in the proceeding, may not invoke the original jurisdiction of this Court.[20]

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[17] *Saint* v. *Allen*, 172 La. 350, 361 (1931).

[18] See also: *Murff* v. *Louisiana Highway Comm'n.*, 140 So. (La. App.-1932) 863.

[19] 74 F (2d) (CCA 5-1935) 910, cert. den., 294 US 729.

[20] Each state could really control the original jurisdiction of this Court, if by mere legislative action authorizing suits by its political subdivisions or others to be brought in its name, it might thus effectively grant leave to file such suits as original actions in this Court, and the number of such suits might well become legion. See *New Hampshire* v. *Louisiana*, 108 U. S. 76; *Oklahoma* v. *Cook*, 304 U. S. 387.

1—This Court is Without Jurisdiction of this Cause,

b—Because the action involves alleged claims against this opponent, a citizen of Louisiana, as a necessary and indispensable party thereto.

The proposed complaint names citizens of California, New York and New Jersey (all residents of New York), along with the present opponent, a citizen and resident of Louisiana, as defendants. It is averred that the controversy is separable as to the resident of Louisiana, and that the complaint might be dismissed as to him without affecting the proceedings against the other parties.

It is submitted, in the alternative, that even though the State of Louisiana may be held to be the proper party complainant, on the face of the proposed complaint and of the prayer, the relief sought against each of the defendants, including this appearer, a citizen and resident of Louisiana, is inextricably inter-woven with that sought against each of the other defendants, judgments being sought against all of them *"in solido"*, with some relief[21] sought against this opponent alone. It is respectfully submitted that under these circumstances, this appearer, although a citizen of Louisiana, is both a necessary and indispensable party to the proceedings.

This Court has had repeated occasion to hold that its original jurisdiction may not be invoked, even by a State, in a proceeding against citizens of other States, when citizens of the complainant state are indispensable or necessary parties defendant to the action.[22] *A fortiori*, this Court can have no original jurisdiction of an action by a State against one of its own citizens.

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[21] Prayer, paragraph 5.

[22] See: *Pennsylvania* v. *Quicksilver Mining Co.*, 10 Wall. (77 U. S.) 553 (1871); *New Mexico* v. *Lane*, 243 U. S. 52 (1917).

The leading decision on the point is that of *California* v. *Southern-Pacific Company.*[23] In that case, as in the subsequent decisions, the citizen of the complainant state involved, had not actually been made a party defendant. The Court simply found that a citizen of the complaining state was a necessary party defendant, and since the proceeding could not go on without such citizen, and since the inclusion of such citizen as a defendant would oust the court's jurisdiction, the proceeding had to be dismissed.

In the instant case, the citizen of the complaining state, the present opponent, is made a party defendant to the proposed complaint, and the complainant merely states that if this Court should find that it is without jurisdiction under the circumstances, the controversy should be treated as a separable one, and that portion thereof directed against the citizen of Louisiana should alone be dismissed. In *California* v. *Southern Pacific Company, supra,* this Court held that in the exercise of its original "exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal"; and that "the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction".[24]

It is not disputed that one who is not a party to an action is not technically bound by any judgment rendered therein. But as stated by this Court itself, an adjudication of a point by this Court necessarily carries such weight as in effect to adjudicate the rights of all persons, whether parties to the proceeding or not, in any subsequent litigation involving the same point, wherever such subsequent litigation might arise.

True, Mr. Justice Harlan dissented from the decision of the Court in *California* v. *Southern-Pacific Company, supra,*

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[23] 157 U. S. 229 (1895).

[24] *Ibid.,* at p. 257.

but his dissent was based rather on what he considered the fine-spun theory on which a State would be deprived of the right to invoke the original jurisdiction of the Supreme Court, simply because one of its citizens had, or might assert, some interest in the subject matter of that controversy.[25]

It is interesting to note that in a subsequent decision, this Court again dismissed such a proceeding, because citizens of the complainant state were necessary parties defendant to the action; and that Mr. Justice Harlan participated in the decision, and did not dissent therefrom.[26]

Similarly, in *Texas* v. *Interstate Commerce Commission*,[27] this Court held that if the citizenship of necessary parties to a proceeding is "such that they cannot be brought into the suit consistently with the limitations on our original jurisdiction, this does not justify us in proceeding in their absence".[28]

Finally, in *Pennsylvania* v. *West Virginia*,[29] while a majority of the Court held that certain citizens of the complainant states were not essential parties, and accordingly maintained the jurisdiction of the Court, Mr. Justice Brandeis (Mr. Justice Holmes concurring), dissented from the majority, on the express ground that since the citizens of the complainant states would not be bound by the decree in the suits, the Court should not entertain the proceeding. Here again, they felt, "it does not comport with the gravity and finality which should characterize an adjudication in the exercise of the original jurisdiction of this Court to proceed, at the instance of a State, in the absence of parties whose rights would be actually passed upon and be in effect determined, even though they might not be technically bound

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[25] *Ibid.*, at p. 263.

[26] *Minnesota* v. *Northern Sec. Co.*, 184 U. S. 199 (1902).

[27] 258 U. S. 158 (1922).

[28] *Ibid.*, at p. 163. See also: *Arizona* v. *California*, 298 U. S. 558.

[29] 262 U. S. 553 (1923).

in subsequent litigation in this, or some other tribunal".[30]

It is respectfully submitted, that the present opponent, a citizen of Louisiana, named by the State of Louisiana as a co-defendant in the proposed complaint in the instant proceeding, is a necessary and indispensable party thereto, "whose rights would be actually passed upon and be in effect determined" by any decree entered in such an action by this Court, even though he were not a party to the proceeding, and even though he would not "be technically bound in subsequent litigation in this, or some other tribunal"; and this Court accordingly lacks jurisdiction of the proposed action.

2—This Court should decline to take jurisdiction of this cause, because it is not a suit in equity, but is a simple action at law for an ordinary money demand, required to be tried by jury.

The complaint which the State of Louisiana proposes to file in this proceeding, is characterized by the State as one in equity, on a cause of action for which complainant alleges it has no adequate remedy at law, to rescind a contract, for discovery and accounting, and to avoid a multiplicity of suits. In truth and in fact, however, the ultimate relief for which the State prays in the proposed complaint, is merely a judgment for the payment of money on a cause of action arising out of rescision of contract; the amount for which recovery is sought, to be determined, under certain of the alternative pleas, by discovery and accounting.

The only multiplicity of suits averred, involves the suggestion of the State that the citizen of Louisiana can be

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[30] *Ibid.*, at p. 617. The report of the decision of *Ohio* v. *Helvering*, 292 U. S. 360, cited by counsel for the State of Louisiana, contains no indication as suggested by counsel, that citizens of the plaintiff State were joined as co-defendants in a separable controversy. All that this Court said was: "The bill alleges that the defendant Helvering is Commissioner of Internal Revenue, and that the other defendants are Collectors of Internal Revenue in the several Internal Revenue Districts of the State of Ohio." No contention was made as to jurisdiction; and this Court simply declined leave to file the complaint, since it failed to disclose a cause of action.

made a defendant in an action in that State only, whereas the other defendants can all be brought into Court only in New York; thus requiring two suits at law, instead of only one in this Court if original jurisdiction of this Court were sustained. This, despite the suggestion of the State that the suit against the citizen of Louisiana is separable, and may be dismissed without prejudice to the proceeding against the other defendants, should this Court find such dismissal necessary to sustain its original jurisdiction!

As long ago as 1886, this Court had occasion to hold that a bill praying for discovery, for rescision and cancellation of a contract, coupled with a money demand, with various alternative and additional pleas, was nevertheless an action at law, triable by jury under the Constitution. This Court held that the bill could not be maintained as a suit in equity, since "a judgment for pecuniary damages would adjust and determine all the rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled".[31]

In a subsequent case,[32] this Court held that neither a demand for an accounting, the necessity of discovery, nor even an alleged multiplicity of suits gave rise to cause for the maintenance of a bill in equity, when the relief sought was merely a judgment for money. The equitable remedies suggested, said the Court, could all be made available incidentally in an action at law; and as to the plea of multiplicity of suits, "those persons who were guilty of the wrong, must be made parties in either court, in order to bind them. Such alleged multiplicity is not avoided in one court more than in the other."[33]

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[31] *Buzard* v. *Houston*, 119 U. S. 347, 353 (1886).

[32] *United States* v. *Bitter Root Development Co.*, 200 U. S. 451 (1906).

[33] *Ibid.*, at p. 478. Similarly, this Court has held that an action for damages arising out of a conspiracy to defraud, is justiciable at law, and not in equity, although the prayer for relief seeks discovery. *Curriden* v. *Middleton*, 232 U. S. 633 (1914). Even an action for injunction will not lie to avoid a "multiplicity of suits" when it appears that only two suits would be avoided. *Kohlhamer* v. *Smietanka*, 293 Fed. (D. C. Ill.-1917) 408.

The proposed action is accordingly simply one at law, seeking recovery of money. This was the situation in *Massachusetts* v. *Missouri*,[34] in which this Court held that to open its doors to such actions by the States "would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it". In such a situation, said this Court, it may properly withhold the exercise of the jurisdiction conferred upon it "where there is no want of another suitable forum".[35]

It must not be forgotten that any action taken by this Court becomes an important precedent for the future; and, as this Court has said, "in the matter of practice we are obliged to bear in mind, in an essential degree, the effect of every step taken in the instant case on those which may succeed it."[36]

If this Court were to permit the filing of the instant complaint, the precedent would give rise to rapidly multiplying actions of a similar nature. As recently stated by Mr. Justice Frankfurter in his dissenting opinion in *Texas* v. *Florida*:[37] "But if experience is any guide, the present decision will give momentum to kindred litigation . . . Legal doctrines have, in an odd kind of way, the faculty of self-generating extension. Therefore, in pricking out the lines of future development of what is new doctrine, the importance of these issues may make it not inappropriate to indicate . . . potential abuses to which the doctrine is not unlikely to give rise".

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[34] 308 U. S. 1, 17-19 (1939).

[35] Both the federal and state courts of various local jurisdictions are available to the complainant as "suitable forums" for the proposed action. See *Ames* v. *Kansas*, 111 U. S. 449 (1884); *Delafield* v. *Illinois*, 2 Hill 159 (1841).

[36] *Washington* v. *Northern Sec. Co.*, 185 U. S. 254, 256 (1902).

[37] 306 U. S. 398, 434 (1939).

The foregoing thoughts are particularly appropriate when applied to such an action at law for the recovery of damages as is involved in the proposed complaint in the instant proceeding. As has been demonstrated, the proposed action is simply one at law seeking a recovery of money. If the Court grants leave to file the complaint, the defendants will unquestionably avail themselves of the right secured them by the Seventh Amendment to the Constitution to demand trial by jury.[38] The thought that this Court might be required to sit, in the exercise of its original jurisdiction, to preside over a jury trial, if the doctrine for which the State of Louisiana contends were given sanction, renders it "not inappropriate to indicate potential abuses to which the doctrine is not unlikely to give rise".

It is accordingly respectfully submitted that this Court should decline leave to the State of Louisiana to file its original complaint in this Court in the instant proceeding.

Respectfully submitted,

Bon Geaslin,
Washington, D. C.,
Attorney for Appearer.

Washington, D. C.,
September, 1941.

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[38] "The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury." 28 U. S. C. Sec. 343.